The defendant filed a defence to the action and the plaintiff filed a reply.

The latest affidavit the plaintiff relies on in support of her application was filed on April 3, 1980. And in resisting the application the defendant relies on his affidavit of April 30, 1980.

In considering the averments in both the affidavits it is clear that there are certain important questions to be determined before an order in terms of the application can be given without hearing evidence.

Firstly: Is the defendant's occupation of the premises by licence or by a tenancy?

Secondly: Was there a valid notice to quit? — There was no notice to quit before the court.

Thirdly: Was there any oral agreement between the original plaintiff and the defendant?

Fourthly: Is there any substance in the defendant's allegation that the plaintiffs are reluctant to bring the matter for trial, are deliberately delaying the trial and hoping to evict him by judgment without trial?

The court was of the opinion that there were issues both of fact and law and that this was not a case where the defence should be struck out or the defendant allowed to defend only on payment of a sum of money into court.

For these reasons the application was dismissed with costs.

Application dismissed.

Solicitors: *R. Rajasingam & Co.; Annamalai & Co.*

LIM GAIT TONG v. PENINSULAR LAND DEVELOPMENT BHD. & ANOR.

[O.C.J. (Arulanandom J.) March 24; July 7, 1980 & April 13, 1981]

[Penang — Civil Suits Nos. 82, 83 & 19 of 1969]

Practice and Procedure — Application to strike out suits for want of prosecution — Ten years' delay — Witnesses unavailable — Application allowed.

The three applications to strike out suits were brought by the same respondent against the different applicants for want of prosecution. It was agreed that as the grounds of applications were the same, application in Civil Suit 83/69 would be heard and the other two applications would abide by the decision in the application.

The respondent was an undischarged bankrupt. He was made bankrupt in 1969. On August 5, 1976, over 7 years after the commencement of these civil suits by the respondent, Messrs. Shearn, Delamore & Co. was granted permission to act on behalf of the Official Assignee to continue the said civil suits in the High Court at Penang. On July 19, 1977, over eight years after the commencement of the said civil suits, Messrs. Shearn, Delamore & Co. informed the applicants that they had notified the Registrar to proceed to fixing of the cases for hearing. Nothing else happened until January 3, 1980 when a Notice was issued under Order 64 r. 13 of the intention to proceed. The three main witnesses for the applicants were then no longer available to give evidence.

Held, allowing the application: through the inordinate delay of over ten years important and indispensable witnesses for the applicants on whom they had to lean very heavily to support their cases had been made unavailable for their defences. For the applicants to prosecute their cases without these witnesses would be to put on them a burden which they, through no fault of their own, will be unable to discharge. For the court to place such a burden on them would be a gross travesty of justice. The suit were therefore dismissed with costs for want of prosecution.

CIVIL SUIT.

T.R. Hepworth for the defendants/applicants.

C. Abraham for the plaintiff/respondent.

Arulanandom J.: These three applications were before the court at the same time and they were all applications to strike out suits brought by the same respondent against the different applicants for want of prosecution.

It was agreed that as the grounds of applications were the same application in Civil Suit 83/69 would be heard and the other two applications would abide by the decision in the application.

As the respondent was an undischarged bankrupt and as the Official Assignee was not before the court, Mr. R. Khoo of Shearn, Delamore & Co. was allowed to appear as *amicus curiae.*

The applicants' application was supported by the affidavit of T.R. Hepworth affirmed on February 8, 1980. In it the deponent averred *inter alia* that (i) the respondent was adjudicated a bankrupt in August 1969; (ii) on August 5, 1976 over seven years after the commencement of these civil suits by the respondent the Attorney General Malaysia in accordance with section 61(c) of the Bankruptcy Act (Act 55/1967) granted permission to the Official Assignee to employ Messrs. Shearn, Delamore & Co. to act on behalf of the Official Assignee to continue the said civil suits in the High Court at Penang; (iii) On July 19, 1977, over eight years after the commencement of the said civil suits, Messrs. Shearn, Delamore & Co. informed the solicitors of the applicants that they had notified the Registrar to proceed to fixing of the cases for hearing.

(iv) Nothing else happened until January 3, 1980 when a Notice was issued under Order 64 rule 13 of the intention to proceed, but still no application to substitute the Assistant Official Assignee as plaintiff in place of the respondent under Order 17 rule 4.

(v) By now three of the applicants' most important witnesses viz. (a) Johnny Heah the architect in respect of the developments which were the subject-matter of the contracts referred to in Civil Suit 19/69 had left the country to reside permanently in Canada; (b) F.E. Brunton, defendant in Civil Suits 82/69 and 83/69 had left the country; and (c) Messrs. Norman Lehey & Associates the firm of architects involved in the development was no longer in existence and hence all three were not available to give evidence and a fourth Sonny Soon, Assistant Secretary of the Company involved was no longer in their service.

The deponent deposed that the delay in prosecuting the cases was inordinately long and inexcusable and there was a grave risk that a fair trial

would no longer be possible and grave injustice would ensue.

Mr. Khoo as *amicus curiae* resisted the application. One of his grounds was that respondent was incarcerated for five years till July 1974 and that together with the lack of funds to proceed and the technical difficulties faced with the respondent having been adjudicated a bankrupt were the reasons for the delay in prosecution.

One could entertain these reasons if there was only a delay of a few years but here the delay was for over ten years. But what is of graver importance to the court is that through this inordinate delay important and indispensable witnesses for the applicants on whom they had to lean very heavily to support their cases have been made unavailable for their defences. For the applicants to prosecute their cases without these witnesses would be to put on them a burden which they through no fault of their own will be unable to discharge. For the court to place such a burden on them would be a gross travesty of justice.

For these reasons the applications in all three cases were allowed and the suits dismissed with costs for want of prosecution.

Applications allowed.

PUBLIC PROSECUTOR v. KHAIRUDDIN

[O.C.J. (Mohamed Azmi J.) June 20, 1981]
[Kuala Lumpur — Federal Territory Criminal Revision No. 2 of 1981]

Criminal Law and Procedure — Criminal Revision — Charges of criminal breach of trust and dishonest misappropriation against servant — Serious nature of offence — One day's imprisonment and fine — Sentence inadequate — Deterrent sentence in public interest necessary — Penal Code, s. 408.

The accused, a Credit Controller of a bank, pleaded guilty to one charge of criminal breach of trust, an offence under section 408 of the Penal Code, and to three charges of dishonest misappropriation of money under section 403 of the Penal Code. The accused admitted committing criminal breach of trust of $20,000 belonging to the bank on January 7, 1976, and dishonestly misappropriating $35,000 between May 14, 1975 and May 16, 1975; $24,975 on September 8, 1975 and $50,000 on December 10, 1975. On the criminal breach of trust charge, the learned President sentenced the accused to one day's imprisonment and a fine of $2,000 in default of which he would have to serve two months' imprisonment. On the misappropriation charge of $50,000 he sentenced the accused to one day's imprisonment and a fine of $3,000 in default, three months' imprisonment, and on the two other charges involving $35,000 and $34,975, the accused was sentenced to one-day's imprisonment and a fine of $2,000 in default two months' imprisonment on each count. The accused paid all the fines totalling $9,000.

The present court called for the records of the case to determine the propriety of the sentences passed by the Sessions Court.

Held: (1) although a trial court has the discretionary right and the duty to decide whether to be lenient or severe, such discretion and duty must be discharged according to established principles of assessing sentence;

(2) where a person is charged with more than one offence, it is the duty of the court to pass sentences in such a way that each sentence should reflect adequately the seriousness of each particular charge. In the present case, whilst the learned President had assessed the sentences on the three charges for dishonest misappropriation *inter se* adequately, he had failed to appreciate that the offence of CBT by a servant was serious in nature;

(3) public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would be offenders would be deterred;

(4) this is a proper case where the court should exercise its revisionary power and enhance the sentence on the criminal breach of trust charge from one day's imprisonment to eighteen months in addition to the fine of $2,000. The sentences imposed on the other three charges of dishonest misapproprition were affirmed.

Cases referred to:-

(1) *R.* v. *Ball* (1951) 35 Cr. A.R. 164, 165.

(2) *Wickrasooriya* v. *Public Prosecutor* [1964] M.L.J. 281.

(3) *R.* v. *Pugh & Rendell* (1981) Cr. L.R. 270.

(Cases cited but not mentioned in judgment: *Public Prosecutor* v. *Mohamed Ramly* [1974] 1 M.L.J. 95; *Lee Yew Siong* v. *Public Prosecutor* [1973] 1 M.L.J. 37.)

CRIMINAL REVISION.

Shaikh Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the applicant.

S.T. Lee for the respondent.

Mohamed Azmi J. (delivering oral judgment): I have called for the records of this case with the view to determining the propriety of the sentences passed by the Kuala Lumpur Sessions Court on May 27, 1981.

The accused, a Credit Controller of Bank Rakyat Kuala Lumpur, pleaded guilty to one charge of criminal breach of trust, an offence under section 408 of the Penal Code, and to three charges of dishonest misappropriation of money under section 403 of the Code. On the charge of section 408, he admitted committing criminal breach of trust of $20,000 belonging to the Bank on January 7, 1976. On the other three charges, he admitted dishonestly misappropriating $35,000 between May 14, 1975 and May 16, 1975; $24,975 on September 8, 1975 and $50,000 on December 10, 1975. The criminal breach of trust offence was discovered in December 1979 by ASP Chow Keng Hock on investigating into the audit report of Messrs. Price Waterhouse on the Bank; whilst the other three charges of dishonest misappropriation were discovered in March 1977 by Encik Tajuddin bin Amiruddin, an Executive Officer of the Bank. On the criminal breach of trust charge, the learned President sentenced the accused to one day's imprisonment and a fine of $2,000 in default two months. On the misappropriation charge of $50,000, he sentenced the accused to one day's imprisonment and a fine of $3,000 in default three months, and on the two other charges involving $35,000 and $34,975, the accused was sentenced to one day's imprisonment and a fine of $2,000 in default two months on each count. The accused paid all the fines totalling $9,000; and for the one day's imprisonment, it can be assumed that he was released when the court adjourned for the day.

It is my view that having regard to the serious nature of the criminal breach of trust (CBT) charge by a servant under section 408 which carries a maximum punishment of seven years' imprisonment and also fine, and coupled with the large sum of $20,000 misappropriated, the sentence of one day's imprison-